IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 55742-4-I
Respondent,	)	(consolidated w/No. 56740-3-I)
	)	
v.	)	DIVISION ONE
	)	
BERT EDMOND RABER,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 7, 2006

PER CURIAM. A jury found Bert Raber guilty of first degree driving while license suspended and attempting to elude a pursuing police officer. On appeal, Raber argues that defense counsel should have requested a lesser included offense instruction on the attempting to elude charge. He also filed a separate notice of appeal challenging the restitution order. But Raber has made no showing that defense counsel's decision was not a legitimate trial strategy. Accordingly, he was not denied his right to effective assistance of counsel. We also reject Raber's additional grounds for review. We therefore affirm.

FACTS

Following a police chase through Lake Forest Park and Shoreline, Raber was charged with one count of attempting to elude a pursuing police officer, one court of first degree driving while license suspended, and one count of driving while under the influence. At trial, Lake Forest Park Police Officer David

Harkness testified that at about 9 p.m. on August 7, 2003, he noticed a car on Bothell Way that kept drifting over the lane marker. The car, which was driven by Raber, also failed to use its turn signal. After Officer Harkness activated his overhead lights to make a traffic stop, Raber immediately pulled over to the side of the road and stopped his car. Harkness noticed that Raber appeared to "move around" as though he were putting something under the seat and called for a backup.

Harkness got out of his patrol car and started walking to Raber's car. As Harkness approached, Raber drove off. Harkness returned to his patrol car, activated his lights and siren, and gave chase. Raber eventually turned off Bothell Way and headed west on NE 145th, reaching speeds of 55 to 60 miles per hour in a 45-m.p.h. zone. At Fifteenth Avenue NE, Raber turned right through a red light without stopping and headed north. According to Harkness, traffic initially was light and Raber changed lanes frequently. When he reached NE 175th, Raber turned right and drove east, traveling about 50 m.p.h.

Raber turned right at Twenty-fifth Avenue NE and then right at NE 171st. When Raber reached Fifteenth Avenue NE, he turned right again and then stopped in the middle of the road. When Harkness pulled up next to Raber's car, Raber drove off, accelerating to about 60 m.p.h. and nearly colliding with another car before turning left at NE 175th. According to Officer Ron Huston, who had joined the pursuit, Raber stopped at a red light in the left turn lane at

NE 175th. After using his turn signal, Raber turned left through the red light. Huston testified that during the pursuit, Raber made it clear that he was not going to stop, but he was not driving erratically and occasionally used his turn signal.

After turning onto NE 175th, Raber had to slow down as he encountered increased traffic. At one point, it appeared Raber was blocked by traffic, but he maneuvered around the cars and took off. When Raber stopped at a light near Interstate 5, Harkness and Huston attempted to block Raber's car. While attempting to avoid the officers, Raber collided with Huston's patrol car.

Drawing their guns, the officers repeatedly ordered Raber out of his car. When Raber failed to comply, the officers dragged him from the car and placed him under arrest. Raber had a strong odor of intoxicants, bloodshot eyes, and a flushed face, but the officers did not notice any slurred speech. In a search incident to the arrest, officers found one open and one unopened beer can in Raber's car. When Raber was taken to the police station, he declined to take a breath test. After being advised of his rights, Raber agreed to talk to the officers. When asked if he was attempting flee because his license was suspended, Raber responded, "yeah, and … I'm drunk."

Raber testified that he had worked until about 8 p.m. on August 7, 2003, and had then driven to his home in Shoreline. On the way home, he stopped to purchase two cans of beer. At home, Raber drank part of one of the beers while

he worked on his car's engine, which had recently been misfiring. A short time later, Raber threw the cans on the seat and took the car out for a test drive when he was stopped. Raber acknowledged knowing that his driver's license was suspended.

Raber noticed that Officer Harkness had been following him for quite some time when he was pulled over. Raber explained that he immediately pulled over, but then panicked as the officer approached:

> I have post traumatic stress syndrome from severe child abuse and I have a panic disorder. I'm not just making an excuse, but also I used to work in Lake Forest Park and I had a history 10, 15 years ago of being harassed by the Lake Forest Park Police Department … My motive was to get myself out of Lake Forest Park and into Shoreline jurisdiction.

Verbatim Report of Proceedings (Jan. 5, 2005) at 94, 96. Raber denied driving under the influence of alcohol and insisted that his driving was never out of control during the chase and that he repeatedly stopped and used his turn signals to avoid putting other people at risk. Raber also denied colliding with Officer Huston's patrol car. He maintained that he had stopped when Officer Huston drove his patrol car into his car. According the Raber, the officers then pulled him out of the car and threw him to the ground, dislocating his shoulder.

During closing argument, defense counsel noted Raber's testimony that he was aware that his license had been suspended. As to the attempting to elude count, counsel acknowledged that Raber had tried to get away from the Lake Forest Park officers, but argued that the evidence, including the State's

own witnesses, established that Raber had not been driving recklessly and was therefore not guilty of attempting to elude.

The jury found Raber guilty as charged of Count I (attempting to elude) and Count III (driving while license suspended), but not guilty of Count II (DUI). The court imposed concurrent six-month terms.

DECISION

On appeal, Raber challenges only his conviction for attempting to elude, arguing that he was denied effective assistance when defense counsel failed to propose a lesser included offense instruction for failure to obey, or refusal to cooperate, with a police officer. See RCW 46.61.022. In order to establish ineffective assistance of counsel, Raber must show both (1) that his attorney's representation fell below an objective standard of reasonableness, and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption of effective representation, and the defendant carries the burden of demonstrating there was no legitimate strategic or tactical rationale for the challenged conduct. McFarland, 127 Wn.2d at 336.

In order to convict Raber of attempting to elude, the State was required to prove, among other things, that he drove "in a reckless manner." Instruction 6 defined this term as "to drive in a rash or heedless manner, indifferent to the

consequences." The failure to obey or refusal to cooperate with a police officer is a lesser included offense of attempting to elude a police officer. State v. Gallegos, 73 Wn. App. 644, 651-52, 871 P.2d 621 (1994). The State concedes that the evidence in this case, including Raber's testimony that he was fully cognizant of the other drivers during the chase and Officer Huston's acknowledgement that Raber was not driving erratically, would have supported the giving of the lesser included instruction if requested.

Raber argues that the sole reason defense counsel did not request the lesser included instruction is because he requested a Sherman[1] instruction. But nothing in the record supports this assertion, and Raber has not satisfied his burden of demonstrating there was no legitimate tactical reason for defense counsel's decision.[2]

Washington court have recognized that defense counsel's decision to pursue an "all or nothing" strategy – seeking acquittal on a greater offense rather than requesting a lesser included offense instruction – does not necessarily constitute deficient performance. See State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (in prosecution for second degree assault, defense counsel not deficient for not proposing lesser included instruction for simple assault). In State v. Hoffman, 116 Wn.2d 51, 804 P.2d 577 (1991), a prosecution for first

[1] See State v. Sherman, 98 Wn.2d 53, 653 P.2d 612 (1982).

[2] The trial court denied the requested instruction, noting that RCW 46.61.024 had been amended shortly before Raber committed his offense to remove the "wanton or willful disregard" language.

degree murder, our Supreme Court rejected the suggestion that the trial court had erred by acquiescing in the defense's decision not to request lesser included offense instructions:

> Had the jury decided (as the defendants strenuously argued) that the evidence did not prove the charges of murder in the first degree and assault in the first degree beyond a reasonable doubt, then under the instructions given, the defendants would have been acquitted. The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense instructions given was clearly a calculated defense trial tactic and, as we have held in analogous situations, it was not error for the trial court to not give instructions that the defendant objected to.

Hoffman, 116 Wn.2d at 112-13.

In State v. Ward, 125 Wn. App. 243, 104 P.3d 670 (2004), relied upon by Raber, this court concluded that defense counsel's decision to pursue an "all or nothing" approach was objectively unreasonable. In Ward, the defendant was charged with second degree assault after he allegedly pointed a gun at two men who were repossessing his car. The defendant denied pointing his gun but testified he acted in self-defense because he believed the men were attempting to steal his car. We noted the significant difference in penalties between the greater and lesser offenses, the fact that the defendant's theory of the case applied to both offenses, and the particularly risky nature of the defendant's claim of self-defense. Ward, 125 Wn. App. at 249-50. Under these circumstances, we concluded that defense counsel's strategy was objectively unreasonable because it exposed the defendant to the unreasonable risk of

conviction on the only option presented:

> [I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction . . . precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Ward, 125 Wn. App. at 250 (quoting Keeble v. United States, 412 U.S. 205, 212-13, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)).

We recently reached a similar result in State v. Pittman, No. 55682-7-I (Wash. Ct. App. June 19, 2006). In Pittman, the defendant was convicted of attempted residential burglary. Relying on Ward, we concluded that the defendant had been prejudiced by defense counsel's failure to request a lesser included instruction for attempted first degree trespass, noting the difference in penalties between the greater and lesser offenses, the defense's repeated acknowledgment that the defendant had committed the lesser offense, and the State's weak evidence of the intent necessary to support the greater offense. Pittmann, slip. op. at 12-13.

But as both Ward and Pittman make clear, the determination of whether an "all or nothing" strategy is objectively reasonable is necessarily a highly fact-specific inquiry. In addition to the factors at issue in Ward and Pittman, relevant

considerations include the existence of multiple charges, the defense's assessment of the jury and the credibility of the State's witnesses, and the degree of the defendant's participation in crucial aspects of the defense strategy, including the decision whether to testify. Many of these considerations will not necessarily be reflected in the record on direct appeal.

In any event, both Ward and Pittman are factually distinguishable. Unlike the defendants in those two cases, Raber was tried on three different offenses, and during his testimony, Raber essentially admitted committing one of the charged offenses – driving while license suspended. Thus, in assessing the defense strategy, Raber would have been aware that he faced incarceration for one of the charged offenses, regardless of the outcome of the other two charges. This fact may well have affected Raber's assessment of "the substantial risk that the jury's practice will diverge from theory"[3] as to the other charges.

In addition, unlike the defendant's claim of self-defense in Ward, Raber's defense did not apply to both the greater and lesser offenses. Raber's testimony that he attempted to get away from the pursuing officers was essentially an admission that he committed the lesser offense. Moreover, although there are significant differences between the consequences of a felony conviction for attempting to elude and a misdemeanor conviction for failure to obey, the standard range for Raber's attempting to elude conviction – 2 to 6 months – was comparable to the potential sentences for the other charges.

[3] Ward, 125 Wn. App. at 250.

Finally, it is apparent from comments made during closing argument that defense counsel discussed carefully with Raber the decision to testify. In his testimony, Raber frankly admitted committing one of the charged offenses and attempting to get away from the pursuing police officers. But Raber was also concerned about explaining his motivation and prior experience with the Lake Forest Park Police Department, and his admissions were a legitimate attempt to bolster his credibility when challenging the State's account of the chase. This strategy was not completely unsuccessful as the jury acquitted Raber of the DUI charge.

In summary, on the record before us, Raber has not sustained his burden of demonstrating that there was no legitimate tactical reason for defense counsel's failure to request a lesser included instruction on the attempting to elude charge. Accordingly, his claim of ineffective assistance fails.

In a consolidated appeal, Raber challenges the restitution order entered in conjunction with the attempting to elude conviction. But this challenge rests solely on the claim that the conviction should be reversed because of ineffective assistance of counsel. Because we have rejected the challenge to the underlying conviction, we affirm the restitution order.

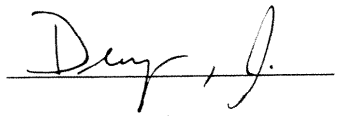
Raber has filed a statement of additional grounds for review as allowed by RAP 10.10. He first contends that Officer Harkness committed perjury when he testified at trial that he had worked for the Lake Forest Park Police Department

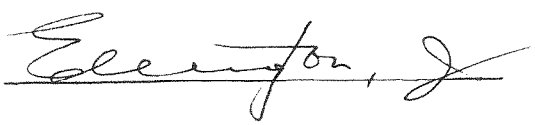
for five years. Raber points to Harkness's testimony during the suppression hearing indicating that he had been employed for 24 years. But the record indicates that Harkness's reference to five years involved only the time he had worked as a patrol officer, not the total length of his employment. Raber fails to make any showing of perjury.

Raber's additional arguments involve the inconsistencies in the testimony of the police officers about his actions during the chase and the alleged collision, the editing of a tape recording of the officers' comments during the chase, and the comments of the court at sentencing. For the most part, these allegations involve credibility determinations that are not subject to appellate review. See State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996). Raber's allegations also implicate circumstances and evidence that are not part of the record and therefore cannot be considered on direct appeal. See McFarland, 127 Wn.2d AT 337-38.

The judgment and sentence and restitution order are affirmed.

For the court:





Cox, J.